Nos. 80-1798, 80-1808 and 81-91

IN THE

Supreme Court of the United States

October term, 1981

Office - Supreme Court, U.S.
FILED
NOV 23 1981
ALEXANDER L. STEVAS,
CLERK

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONER OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

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QUESTIONS PRESENTED

Section 8(e) of the Labor Management Relations Act makes it an unfair labor practice for an employer and a union to enter a contract whereby the employer agrees "to cease doing business with any other person." The "construction proviso" to § 8(e) creates an exception for certain agreements between unions and employers in the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction." In *Connell Co. v. Plumbers & Steamfitters*, 421 US 616 (1975), this Court held that the scope of the construction proviso is limited to the Congressional purpose when enacting it, and that a subcontractor clause which prohibited the general contractor from doing business with any subcontractor that had no labor contract with the union (a signatory clause) and which thereby organized subcontractors' employees from the top down, was prohibited by § 8(e) and was not protected by the construction proviso because not within the proviso's purpose. The union in *Connell* did not represent any of the general contractor's employees on any of the general contractor's construction sites.

1. Whether the "collective bargaining relationship" between a union and a general contractor which arises when the general contractor may employ one or more of the union's members for a time on a single job invokes the protection of the construction proviso for the union's use at all times on all jobs, throughout the life of the labor contract, of a signatory secondary boycott subcontractor clause which compels subcontractors' employees to join this union without their consent and yet fails on most or many jobs to serve the Congressional design of avoiding friction between the union's members and nonunion workers.
2. Whether construction unions are free, because of the construction proviso to § 8(e) of the LMRA, to secure "from any general contractor vulnerable to picketing" (*Connell*, 421 US at 633) a broad signatory secondary boycott subcontractor clause which organizes subcontractors' employees from the top down on all jobs even though the union's members employed by the general contractor are not present on the job, so the union is not part of the "close community of interests" there and the clause does not have the redeeming virtue of avoiding jobsite friction between the union members and nonunion workers, simply because the clause is in a "collective bargaining relationship"—which in practice means that the clause is applicable at all times to all jobs

simply because the general contractor may employ the union's members either now or in the future for at least some time on some job.

3. Whether the majority decision below is contrary to *Connell*, supra, because *Connell* held a subcontractor clause to be outside the protection of the § 8(e) construction proviso when the general contractor employed none of the union's members on any of its jobs, yet the majority below held an identical subcontractor clause to be protected by the proviso and enforceable at all times on all jobs simply because it was contained in an agreement in a "collective bargaining relationship"—which means in practice that the general contractor may employ a union member on some job some time.
4. Whether a group boycott agreement which excludes from a large portion of the construction market any subcontractor whose employees have elected to be nonunion or have selected a different union, although the subcontractor pays wages and benefits equal to or more than the union's standard, is legalized by the construction proviso to § 8(e) even though the agreement applies when none of the union's members employed by the general contractor are present on the construction site, so the purpose of the clause is not to avoid friction between the union members and nonunion workers employed by the subcontractors but is to organize subcontractors' employees from the top down.

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BRIEF OF PETITIONER OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

OPINIONS BELOW

The opinion of the limited *en banc* panel of the court of appeals is reported at 654 F2d 1301. The opinion of the three-judge panel of the court of appeals is reported at 609 F2d 1341. The decision and order of the National Labor Relations Board is reported at 239 NLRB 274.

JURISDICTION

The judgment of the limited *en banc* panel of the court of appeals was entered on April 17, 1981. Woelke & Romero Framing, Inc. filed a petition for a writ of certiorari on April 29, 1981, Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. filed a petition for a writ of certiorari on April 29, 1981, and Oregon-Columbia Chapter, the Associated General Contractors of America, Inc. filed a petition for writ of certiorari on July 14, 1981, invoking the jurisdiction of this Court under 28 USC § 1254(1). All three petitions were granted on October 5, 1981.[1]

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act are as follows:

> Sec. 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." (29 USC § 157)
>
> Sec. 8(b)(4)(A):"(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> • • • • •

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[1]Pursuant to Rule 34.1(b) of the Rules of the Supreme Court of the United States, it is noted that all parties to the proceeding in the Court below are shown in the caption of the case in this Court, except for International Union of Operating Engineers, Local No. 701.

The list of related entities required by Rule 28.1 of the Rules of the Supreme Court of the United States is provided on page 2, footnote 1, of AGC's Petition for Writ of Certiorari.

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by section 8(e);" (29 USC § 158(b)(4)(A))

Sec. 8(e): "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer,' 'any person engaged in commerce or in industry affecting commerce,' and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer,' 'any other employer,' or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception." (29 USC § 158(e))

STATEMENT OF THE CASE

A. The subcontractor clause and its effects.

1. **The subcontractor clause.** A clause in the AGC[2]-Local 701[3] labor agreement prohibits AGC's members from subcontracting jobsite operating engineer work to any subcontractor who has not signed a labor agreement with Local 701.[4] The clause applies at all times to all jobs (J.A. 11).

The clause is not satisfied by the subcontractor paying wages and benefits equal to or even more than the AGC-Local 701 agreement. The subcontractor must be signatory to Local 701's agreement which requires all employees performing operating engineer work to join Local 701 (J.A. 11).

The Local 701-AGC agreement is effective for a five-year period. It covers all of the state of Oregon and 5-1/2 counties of Southwest Washington (J.A. 9). The 200 AGC general contractors bound by the agreement perform a substantial portion of the construction work throughout this area (J.A. 11).

2. **The effects of the clause.** The effects of this clause are of two kinds and are far reaching. First, the clause is a group boycott forcing all AGC contractors to not deal with any nonsignatory subcontractor. Second, the clause is a broad top-down organizing device forcing all employees of subcontractors doing operating engineer work to be members of Local 701; for to get any work on any AGC job the subcontractor must require all his employees doing such work to join Local 701 whether they want to or not.

By this group boycott, subcontractors whose employees have elected to be nonunion or have selected a different union, are excluded from a large portion of the construction market.

The reach of these effects warrants emphasis. For it is their excessive reach that brings the issue before this Court. Since the clause applies at all times to all AGC jobs, its boycott and top-down

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[2] "AGC" is the Oregon-Columbia Chapter, Associated General Contractors of America, Inc. It represents about 200 general contractors for whom it negotiates labor contracts with various unions, including Local 701 (J.A. 9, 11). (All references herein to "J.A." are to Volume II of the Joint Appendix).

[3] "Local 701" is Local 701 of the International Union of Operating Engineers.

[4] The subcontractor clause states: "Employers shall not contract any work covered by this Agreement to be done at the site of the construction . . . to any person, firm or company who does not have an existing labor agreement with [Local 701] covering such work." (J.A. 9-10)

organizing occur even though there are no Local 701 members employed by the general contractor present on the job. At all such times (which are common) there is no possibility of jobsite friction between Local 701's members and a subcontractor's nonunion employees, so avoiding such friction can be no justification for the clause. At all such times the sole function of the clause's signatory requirement is to organize subcontractors' employees from the top down.

Such times are frequent because there are many jobs where the AGC contractors employ no member of Local 701 or do so for only a limited time. The work performed by operating engineers is, in general, the operation of heavy construction equipment such as shovels, backhoes, loaders, tractors, etc. Much of this work in the building industry is normally subcontracted to independent subcontractors. On many projects such equipment is used only occasionally. For example, on a building job the only such equipment may be excavating equipment to dig the foundation early in the project and then grading equipment late in the project for landscaping; although the general contractor might employ members of Local 701 to excavate the foundation, they will have no contact with employees of a landscaping subcontractor who a year later operate grading equipment on the job. The employees excavating the foundation are as much separated from the landscape employees as when they are on two separate projects. There can be no friction between them. At all these times when the general contractor employs no member of Local 701 on the particular job, the sole function of the signatory requirement of this subcontractor clause is to organize subcontractors' employees from the top down.

Nor is the top-down organizing even confined to AGC members' jobsites. The Local 701 agreement required of the subcontractor by this clause applies to all of the subcontractor's jobs and to all his operating engineer employees on those jobs, requiring them all to join Local 701. And on each of the subcontractor's jobs the same clause applies to require the subcontractor's subcontractors to sign a Local 701 agreement with the same requirements. And so on; the clause extends to every job and to every tier of subcontracting, to all who have any subcontracting relationship to anyone who has such a relation at any time on any AGC job.

B. The decisions below.

1. **The Board's decision.**[5] The Board held that this subcontractor clause is a secondary boycott within § 8(e)'s general proscription, but is saved by the construction proviso to § 8(e).[6] The Board reasoned that the proviso is to be applied "literally" (*Woelke*, supra, 239 NLRB at 248) to any clause, such as this, in a "collective bargaining relationship." Although this Court in *Connell*[7] held a virtually identical clause to be outside the proviso based on interpreting the proviso according to the Congressional policies underlying its enactment, the Board held those policies irrelevant here (*Woelke*, supra, 239 NLRB at 249). The Board found this clause to be within the proviso's literal terms and therefore protected by the proviso without regard to or even in violation of Congressional aims, because there is here a "collective-bargaining relationship." The Board did so without even any inquiry into the clause's broad top-down organizing through a group secondary boycott or into its failure to avoid union-nonunion jobsite friction.

2. **The three-judge panel's decision.** A three-judge panel of the Ninth Circuit Court of Appeals unanimously reversed. It rejected the Board's rule that the proviso is to be literally applied to any clause in a "collective bargaining relationship" (609 F2d at 1347-1348; JA 56-57), and held the clause outside the proviso and in violation of § 8(e).

It held that "the purpose of the exception dictates its scope" in all cases (609 F2d at 1350; J.A. 60) and that the proviso's purpose is to avoid the jobsite friction that may occur when members of the union are required to work with nonunion workers of the same craft;[8] that

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[5]The Board's ruling is based on a charge (J.A. 1) filed by petitioner Associated Builders and Contractors of America, Inc. The Board considered this case with three others involving the same issue, including *Carpenters Local 944 (Woelke & Romero Framing, Inc.)*, 239 NLRB 241, 99 LRRM 1580 (1978). The Board's principal analysis was in the *Woelke* case, which the Board followed herein. *Woelke* is also before this Court, consolidated with this case.

[6]The Board held that a "self-help" clause in the contract, in conjunction with the subcontractor clause, violated 8(e) and was not protected by the construction proviso. The court below affirmed the Board on this point. This issue was not raised in any petition for certiorari and is not before this Court.

[7]*Connell Co. v. Plumbers & Steamfitters*, 421 US 616 (1975).

[8]The court followed its own prior holding in *ACCO Construction Equipment v. NLRB*, 511 F2d 848 (9th Cir 1975), *Drivers, Salesmen, Etc., Local Union No. 695 v. NLRB*, 361 F2d 547, 553 (DC Cir 1966), and this Court's *Connell* decision.

this clause "goes well beyond" that purpose since it forbids use of all nonsignatory subcontractors "regardless of whether workers of the signatory union will also be employed on those sites" (609 F2d at 1350; J.A. 60).

The panel found that this clause is "precisely the kind of instrument for 'top-down' organizing which the Supreme Court condemned in *Connell*" (609 F2d at 1350; J.A. 61).

3. **The partial en banc panel's decision.** On rehearing, a limited *en banc* panel reversed in a seven-to-four decision. Although agreeing the clause is within the general prohibition of § 8(e), the majority held the clause is within the construction proviso because it is in a "collective-bargaining relationship."

Although this is the same conclusion reached by the Board, the *en banc* majority's[9] reasoning is different. Unlike the Board, the majority sought the proviso's meaning by examining the "peculiarities" of the construction industry and the manner in which Congress addressed them when adopting § 8(e). The only such "peculiarities" described by the majority are short job duration (654 F2d at 1309-1310; J.A. 72-73); "shoulder-to-shoulder friction between union and nonunion workers" on the same jobsite (654 F2d at 1314, 1317; J.A. 83, 88-89); and the "severe problems not only of *maintaining wage levels, but of protecting benefits* . . . " since at the jobsite " . . . *working conditions applicable to one set of workers may very well affect others working on the same project*" (654 F2d at 1316-1318; J.A. 87-89; emphasis added).[10] The majority concluded that these interests require that signatory subcontractor clauses be protected whenever they are in a "collective bargaining relationship."

The majority relied on three short statements out of the legislative history (discussed below at pp 39-48) but recognized that its interpretation of them is "not free from doubt" (654 F2d at 1312; J.A. 78). It "concedes" that *Connell* "may well lean in a direction contrary to our views" (654 F2d at 1320; J.A. 94), and that *Connell* " . . . contains considerable emphasis on problems of shoulder-to-

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[9]We will hereinafter refer to the *en banc* majority simply as the "majority" below.

[10]Although the majority refers vaguely to a "complex" of distinguishing factors in the construction industry (654 F2d at 1316; J.A. 86), the *only* factor it ever specifically describes other than jobsite friction and short job duration, is the need to protect working conditions at the jobsite.

shoulder friction between union and non-union workers at the jobsite, and additional emphasis on antagonism of the 1959 Congress to 'top-down' organizing that is one of the effects of subcontractor agreements " (654 F2d at 1314; J.A. 83). But the majority nevertheless permitted the top-down organizing of this group boycott whether or not "union workers are present at the jobsite, so that the presence of nonunion workers there might lead to friction" (654 F2d at 1312; J.A. 78).

4. The dissenting opinions of the en banc panel. The analysis of the four dissenting judges emphasized *Connell's* "concern with the 'top-down' organizing effect of union signatory clauses" (654 F2d at 1325; J.A. 103); although "any union signatory clause has some 'top-down' organizing effect" they oppose the majority's broadening of this effect (*Ibid*). They noted that prior reviews of the proviso's legislative history by this circuit court, as well as others, had "concluded that the dominant motive of Congress in adopting the proviso was to permit agreements that aimed at eliminating jobsite friction between union and nonunion workers"[11] and that the Board itself had "previously believed: '[T]he 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite.'"[12] "[T]he legislative history supports the conclusion that most congressmen thought the proviso was intended to address the problem of jobsite friction" (654 F2d at 1326; J.A. 106).

The dissent finds that the "bare references" in the legislative history to the pattern of bargaining do not support the view that if "some" broad subcontractor clauses existed in 1959 then Congress intended that any such clause be permitted, since this is directly contrary to "curbing 'top-down' organizing, which, it must be remembered, was Congress's objective in adopting the 1959 Act which included Section 8(e)" (654 F2d at 1326-1327; J.A. 106-107).

An additional opinion by three of the dissenters emphasised that maintenance of union standards—on which the majority relies—can be accomplished "by a common, *primary* restraint: the union

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[11]The dissent cites *ACCO, supra*, 511 F2d 848, 851 (9th Cir 1975); *Drivers, Salesmen, Etc., supra*, 361 F2d 547, 553 (DC Cir 1966); *Essex County & Vic. Dist. Coun. of Carpenters, Etc. v. NLRB*, 332 F2d 636, 640 (3rd Cir 1964).

[12]The dissent quotes from *Intl. Union of Operating Engineers, Local 542*, 216 NLRB 408, 409 (1975), enf'd, 532 F2d 902 (3rd Cir 1976), cert. den. 429 US 1072 (1977).

standards clause" and thereby "avoid many of the evils inherent in the restraints here" of a union signatory clause (654 F2d at 1328; J.A. 109, emphasis in original). They conclude that "the proviso should not be read to permit [such] restraints which extend to jobsites where no unit employees are present and which are therefore unrelated to reduction of jobsite friction" (*Ibid*).

SUMMARY OF ARGUMENT

This deceptively simple clause imposes broad restraints on both employers and employees. Contractors cannot deal with disfavored subcontractors, who are excluded from a large share of the construction market unless they require their employees to join Local 701. The wishes of the subcontractors' employees are ignored. They are organized from the top down. To work for any subcontractor that does any work on any AGC job, the employee must join Local 701 whether he wants to or not.

The boycott is not confined to subcontractors who derive a competitive advantage by paying substandard wages or benefits. Under this clause it matters not that the subcontractor pays as high or higher wages and benefits than under the union contract. It matters not that the subcontractor can perform a better job or do so by more efficient methods. Under this clause the sole test of whether a contractor is favored or blacklisted is whether he has signed the Local 701 contract.

Nor is the clause limited to times when Local 701's members employed by the contractor are present on the job. Its purpose and function, therefore, cannot be to avoid the friction that may result when Local 701's members are asked to work alongside nonunion workers at the same construction site. The only function of the clause's signatory requirement whenever Local 701 members are not present is to organize subcontractors' employees from the top down.

The clause is clearly illegal unless it is within the construction proviso to § 8(e).

In *Connell Co. v. Plumbers & Steamfitters*, 421 US 616 (1975), this Court held a nearly identical clause to be outside the proviso because it did not serve the proviso's purpose. Just as here, the clause in *Connell* was not addressed to the "close community of interests" (*Id* at 630) on a construction site where employees of many employers work side by side. The clause "was not designed to protect" the union's members "from having to work alongside nonunion men"

since the clause "was not limited to jobsites on which [the union's members] were working" (*Id* at 631). Instead, the *Connell* clause served as "an almost unlimited organizational weapon" that organized construction employees from the top down (*Id* at 631). Because the clause here, like that in *Connell*, is a broad top-down organizing weapon and is not designed to protect Local 701 members from working alongside nonunion men, it is outside the proviso and is unlawful.

As held in *Connell*, consistent with a long line of precedent, § 8(e) with its proviso, as well as other provisions of the Act, must not be read literally but "must be interpreted in light of the statutory setting and the circumstances surrounding its enactment" to determine the "'intention of its makers'" (*Id* at 628). This principle "has particular application in the construction of labor legislation which is ' . . . the result of conflict and compromise . . . '"[13] and has particular significance here to § 8(e)'s construction proviso, which was an eleventh-hour addition to the 1959 Act to break a deadlock in the Conference Committee over the most controversial portion of the bill—the secondary boycott provisions. Because there was little time for congressmen to absorb this last-minute addition and because there were no committee hearings to elucidate its meaning, the necessity for "'reconstitut[ing] the gamut of values current at the time . . . '" (*Woodwork*, supra, 386 US at 620) in order to determine the intent of Congress is particularly acute for this statute.

A fundamental and pervading aim of national labor policy is to protect employees' free choice in selecting their bargaining representative. Although the Wagner and Taft-Hartley Acts each implemented this policy, an investigation by the Senate's McClellan Committee in 1957 to 1959 disclosed, among other labor abuses, widespread use by unions of various economic weapons to organize employees against their wishes from the top down. One of the principal weapons was the "hot cargo" agreement by which employers agreed to boycott employers with whom the union had a dispute. Lengthy committee testimony and floor debate almost uniformly condemned such practices; "[o]ne of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees" (*Connell*, supra, 421 US at 632).

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[13]*Woodwork Manufacturers Asso. v. NLRB*, 386 US 612, 619 (1967).

The construction industry has peculiarities which were accommodated by the 1959 Act, but none of them justifies this clause. Because of the short duration of jobs in the construction industry Congress enacted § 8(f), which permits voluntary prehire labor agreements; but it was never asserted that the short duration of jobs justifies forcing subcontractors to sign union agreements against their employees' wishes. "The only special consideration given [construction unions] in organizational campaigns is § 8(f), which allows 'prehire' agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation" (*Ibid*).

Reconstructing the "gamut of values" in 1959 also requires examination of Congressional reaction to this Court's decision in *NLRB v. Denver Bldg. & Constr. T. Council*, 341 US 675 (1951), since the construction proviso "seems . . . to have been adopted as a partial substitute for an attempt to overrule this Court's decision in [*Denver*]" (*Connell*, supra, 421 US at 629). In *Denver* the general contractor engaged a nonunion subcontractor who paid wages substantially below union scale. All other workers on the job were union. The union stated "union men could not work on the job with nonunion men" (341 US at 679) and picketed the job, causing a strike by all union workers. The Court held this violated § 8(b)(4). Justice Douglas dissented stating, "All the union asked was that union men not be compelled to work alongside nonunion men on the same job" (*Id* at 692).

Strong efforts were made to include a provision in the 1959 Act to overrule *Denver*, but these efforts failed in both chambers. The *Denver* debate focused on the concern expressed by Douglas for avoiding the frictions that may occur when union workers are compelled to work alongside nonunion workers on the same job and on construction unions' need to protect their wage standards from the threat posed by workers on the same project paid at subunion wages. Similarly, opponents of a general ban on boycott agreements repeatedly emphasized that such agreements were needed to protect union wage standards. Thus the debates make clear that Congress perceived that a general prohibition against agreements not to do business with others would prohibit agreements ("union standards" clauses) to refrain from doing business with those paying subunion wages. If a "union standards" subcontractor clause were to be lawful, in Congress' view, an exception would have to be made from the § 8(e) ban on secondary agreements. As a "partial substitute"

for an anti-*Denver* bill, the § 8(e) proviso was intended to meet Justice Douglas' concern with union-nonunion friction on the jobsite and to equip construction unions to meet the special threat to wage standards that arose when workers paid at subunion wages worked shoulder-to-shoulder with union workers.

This clause does not fall within these purposes or within Congress' policies when enacting the proviso. The compulsory unionism enforced by this clause is in direct conflict with the Act's "major aim" (*Connell*, 421 US at 632) of limiting top-down organizing, and it cannot be justified by any of the policies stated by Congress as a reason for special construction industry considerations: its signatory requirement goes beyond protecting union standards on construction jobs; its application when no Local 701 members are present goes beyond avoiding jobsite friction; its prohibition against subcontractors' employees selecting any union other than Local 701 cannot be justified as a means to avoid union-nonunion friction.

The Board and majority below erred because they disregard these Congressional purposes whenever the clause is in a "collective bargaining relationship." The proviso is not to be applied according to its purpose only some of the time and in disregard of its purpose at other times. Furthermore, in the construction industry where multi-employer bargaining and prehire agreements are prevalent, a "collective bargaining relationship" often involves only the most tenuous of relationships; it exists merely by a contractor employing one union member on one job sometime, or merely by the union demanding that the contractor do so in the future. Such labels cannot justify this broad clause whose sole function is frequently to organize subcontractors' employees, at large, from the top down. The union has a meaningful representative interest on a job only when its members are present there. At other times this union is not part of "the close community of interests there" (*Woodwork*, supra, 386 US at 639) which the proviso is designed to accommodate; at such other times "the construction industry is no different from any other" (*Ibid*) with respect to this union's valid interests.

The analysis of the majority below is bottomed in the erroneous assumption that such a clause is needed for "maintaining wage levels [and] protecting benefits" (654 F2d at 1316; J.A. 87). But these interests can be protected by a "union standards" clause which requires subcontractors to adhere to union standards—without need

for a union signatory requirement that organizes from the top down.

Disregarding the Act's lengthy legislative history, the majority below seeks support in three short legislative statements to the effect that the proviso is to "avoid serious damage to the pattern of bargaining" and is to preserve existing law. But none of the statements addresses the specific issue here of whether the scope of the proviso was intended to allow a signatory requirement when the union's members are not even present. These brief statements were rejected by this Court in *Connell* as a test for interpreting the proviso. The majority reasons that under these statements a subcontractor clause is lawful if there was "some such clause" which was legal in 1959 (654 F2d at 1314; J.A. 82). But *Connell* considered and rejected that test. *Connell* measured a clause virtually identical to this one against the policies embodied in the 1959 Act without any inquiry concerning the existence of "some such clause" in 1959 and without even suggesting that the state of the law in 1959 had any bearing on this question.

An examination of the 1959 "pattern of bargaining" and 1959 law confirms the wisdom of this Court in rejecting them as a basis for interpreting the proviso. The majority below relies on a study of 1959 subcontractor clauses, but the study is so superficial that the Board's General Counsel characterized it as "inconclusive" on this question, and made his own study, which showed there was no consistent pattern in 1959 and that union signatory clauses in any form occurred in only eight (fewer than twelve percent) of the contracts sampled. Moreover, the legality of such clauses in 1959 was uncertain. While this Court's 1959 *Sand Door (Local 1976, U.B.C.& J.* v. *NLRB*, 357 US 93 (1958)) decision expressly left that question open, the opinion strongly implies that such clauses were not judicially enforceable. Based on *Sand Door* and certain NLRB decisions, key legislators in both chambers expressed the view that secondary boycott clauses were unlawful.

The uncertain state of the law in 1959, the varied views expressed in Congress on this question, and the patchy, inconclusive evidence concerning any "pattern" of signatory clauses in 1959, all support *Connell's* refusal to allow this important statute to pivot on historical esoterica wholly unrelated to the basic purposes of the 1959 Act. Because those same basic purposes must provide the standard against which the clause here is measured, this clause, like that in *Connell*, must fall.

ARGUMENT

A. This subcontractor clause is not within the purpose of the construction proviso and therefore is not within the proviso.

1. The construction proviso to § 8(e) is not to be literally applied, but is limited to the Congressional purpose when enacting it.

As repeatedly held by this Court, § 8(e) and the proviso are not to be literally applied. The union argued for a literal interpretation of the proviso in *Connell* (421 US at 626-627) and this Court rejected it, stating:

> " . . . This Court has held . . . that § 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment:
>
> "'It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers" *Holy Trinity Church v. United States*, 143 US 457, 459' *National Woodwork Mfrs. Assn. v. NLRB*, 386 US 612, 619 (1967)." (421 US at 628)

In *National Woodwork*, cited by *Connell*, the Court went on to state:

> " . . . That principle has particular application in the construction of labor legislation which is 'to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests.' . . . " (386 US at 619)[14]

As shown by the cases *Woodwork* cites, this Court has frequently applied this principle when interpreting the Act.[15]

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[14]In *Woodwork* the Court held that although 8(e) states literally that it applies to "any contract" to "refrain from handling . . . any of the products of any other employer" nevertheless an agreement that "no member of this union will handle . . . any doors . . . which have been fitted prior to being furnished on the job" (386 US at 616) is not within § 8(e).

[15]For example, *NLRB v. Fruit & Vegetable Packers*, 377 US 58 (1964), held that peaceful consumer picketing is excepted from § 8(b)(4), although its exception literally states it is for publicity "other than picketing"; *Mastro Plastics Corp. v. NLRB*, 350 US 270 (1956), held that an employee who strikes to protest unfair labor practices is not within § 8(d), although § 8(d) literally states it applies to

The basic inquiry in this case is, therefore, to determine the Congressional purpose when it enacted the construction proviso.

2. This Court has ruled that the Congressional policies when enacting the proviso were to limit top-down organizing and the proviso's purpose is confined to the "close community of interests" on construction sites where friction may occur if the union's members have "to work alongside nonunion men" (*Connell*, 421 US 616 at 630, 631).

This Court has examined the purpose of the construction proviso on two occasions, once briefly and once in depth. In *Woodwork*, supra, the Court briefly observed that the construction proviso is

> " ... a measure designed to allow agreements pertaining to certain secondary activities on the construction site *because of the close community of interests* there ... ." (386 US at 638-639, emphasis added).

Woodwork cited *Essex County & Vic. Dist. Coun. of Carpenters, Etc. v. NLRB*, 332 F2d 636 (3rd Cir 1964) which states:

> " ... This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists *to work alongside non-union men on the same project*. ... " (332 F2d at 640, emphasis added)

In *Connell*, supra, the Court reviewed in depth the proviso's purpose. The Court held a subcontractor clause virtually identical to this one to be outside the proviso's purpose and therefore outside the proviso.[16]

Connell's analysis of the purpose of the proviso is as follows: One of the "major aims" of the 1959 Act was to limit precisely the top-down organizing which the clause entailed (421 US at 632). The proviso is an exception to that limitation. It is also an exception to § 8(e) which "broadly proscribed using contractual agreements to

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"[a]ny employee who engages in a strike"; *NLRB v. Drivers Local Union*, 362 US 274 (1960), held that restraining and coercing employees by peaceful picketing is not within § 8(b)(1)(A), although that section literally states it is an unfair labor practice for a union to "restrain or coerce" employees.

[16]The subcontractor clause in *Connell* stated "(if) the contractor should contract or subcontract any of the [covered work] ... said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 ... " (421 US at 620).

achieve ... economic coercion" for secondary objectives (*Id* at 628). The Court states that the proviso "seems ... to have been adopted as a partial substitute for an attempt to overrule this Court's decision in *NLRB v. Denver Building & Construction Trades Council*, 341 US 675" (*Id* at 629), and referred (*Id* at 630) to the brief dissent of Justice Douglas in *Denver* where he stated:

> " ... All the union asked was that union men *not be compelled to work alongside nonunion* men on the same job ... " (341 US at 692, emphasis added).

The Court noted that Congress' discussions of "both the § 8(e) proviso and the attempt to overrule *Denver* ... focused on ... the close relationship between contractors and subcontractors at the jobsite," citing portions of the Congressional Record which described a jobsite as a place "where all the men are employed on the *same project* ... [*where*] *they work side by side*."[17] The Court contrasted the construction proviso to the broader exemption provided in the garment-industry proviso, stating:

> " ... Congress did not afford construction unions an exemption from § 8(b)(4)(B) or *otherwise indicate that they were free to use subcontracting agreements as a broad organizational weapon* ... " (*Id* at 630, emphasis added).

Connell stated that "[i]n keeping with these limitations" the Court in *Woodwork* had interpreted the proviso as "'designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there.' " (*Ibid*). *Connell* quoted with favor a court of appeals decision that "'[t]he purpose of the Section 8(e) proviso was to alleviate the friction that may arise when union men work continuously alongside nonunion men on the same construction site.' "[18] The Court cited Douglas' dissent in *Denver* (quoted above), and the statement quoted above from *Essex County v. NLRB*, *supra*, 332 F2d 636, 640 (3rd Cir 1964).

Connell then applied "these policies" to the subcontracting

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[17] 421 US at 629-630, citations in footnote 9; quotations from Representatives Thompson and Udall (105 Cong. Rec. 15541) and memorandum by Senator Elliott (*Id* at 15551-15552); 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter Leg Hist) 1577, 1588 (emphasis added).

[18] *Ibid*, quoting from *Drivers, Salesmen, Etc., Local Union No. 695 v. NLRB*, 361 F2d 547, 553 (DC Cir 1966).

agreement before it (*Id* at 631). It found the agreement "not ... related to any of these policies" (*Ibid*). The agreement "was not designed to protect Local 100's members" from "having to work alongside nonunion men ... since it was not limited to jobsites on which they were working" (*Ibid*). *Connell* observed that if the subcontracting clause were approved then

> " ... The unions would be free to enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the agreement recited that it only covered work to be performed on some jobsite somewhere. The proviso's jobsite restriction then would serve only to prohibit agreements relating to subcontractors that deliver their work complete to the jobsite.
>
> "It is highly improbable that Congress intended such a result. One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. ... " (421 US 631-632)

The Court noted that "[c]onstruction unions are fully covered" by other sections of the Act (such as § 8(b)(7)) which were designed to limit top-down organizing; that the "only special consideration given [construction unions] in organizational campaigns is § 8(f), which allows 'prehire' agreements" but this was done "only under careful safeguards preserving workers' rights to decline union representation" (*Id* at 632).[19]

The final paragraph of *Connell's* analysis of this point begins:

> "These careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing. Absent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on 'top-down' organizing, we are unwilling to read the construction industry proviso as broadly as Local 100 suggests. ... " (*Id* at 633)

Connell employed none of the union's members on any of its jobs.

[19]The Court also observed that "Congress may not have intended that strikes or picketing could be used to extract prehire agreements from unwilling employers" (*Id* at 632-633). The Court subsequently confirmed this in *NLRB v. Iron Workers (Higdon Construction Co.)*, 434 US 335, 348, n. 10 (1978).

Because of this, no "collective-bargaining relationship" existed between Connell and the union. However, the foregoing shows that *Connell's* analysis was *not* based on the absence of a "collective-bargaining relationship." Rather, it was based on the broad top-down organizing impact of the subcontractor clause in a context in which the union's members were not present on the jobsite. The close community of interests when employees work side by side did not exist. Without any union member on the jobsite there was no hazard of the union-nonunion friction which prompted enactment of the proviso, and thus no reason to tolerate the violation of workers' rights to decline union representation.

3. Lower courts and the Board have ruled that the proviso's purpose is to avoid union-nonunion friction.

In *ACCO Construction Equipment, Inc. v. NLRB*, 511 F2d 848 (9th Cir 1975), a clause in the AGC-Operating Engineers labor agreement prohibited the general contractor from contracting out jobsite equipment repair unless performed by members of the Operating Engineers Union. The clause was held to violate § 8(e) and to be outside the proviso's protection because it applied when there was no potential for jobsite friction. The Court rejected a literal application of the proviso, stating:

> " . . . this ignores the purpose of the congressional exemption. Although the legislative history of the proviso is ofttimes vague and inconclusive, what does emerge is an underlying congressional concern with minimizing jobsite tension. In contrast to most other industries, a variety of craftsmen employed by different contractors and subcontractors work continuously side by side on construction projects. Where the employees of some are union members and the employees of others are not, there is a potential, or so Congress believed, for jobsite conflict. Hence, 'the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work *continuously* alongside nonunion men on the same construction site.' *Drivers, Salesmen, Etc., Local 695 v. NLRB*, 124 U.S. App.D.C. 93, 361 F.2d 547, 553 (1966) (emphasis added). What appears critical is that the potential for conflict is likely to arise only when the non-union laborers are in frequent and relatively close contact with the union craftsmen." (511 F2d at 851, emphasis in original)[20]

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[20]This interpretation is also consistent with the principle that "as an exception to

Similarly, in *Intl. Union of Operating Engineers, Local 542 (York County Bridge, Inc.)*, 216 NLRB 408, 88 LRRM 1405 (1975), enf'd 532 F2d 902 (3rd Cir 1976), the Board struck down two clauses which provided that union members would not be required to operate equipment belonging to a nonsignatory. Although the employer employed members of the union and thus a "collective bargaining relationship" was present, the clauses were held outside the scope of the proviso because they went beyond the proviso's purpose of avoiding jobsite friction:

> " ... the 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite. ...
>
> "The provisions [in question] have a different and broader effect. Neither [provision] is limited to situations where the boycotted supplier of the equipment has any employees at the jobsite. ... " (216 NLRB at 409, 88 LRRM at 1407).[21]

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the Landrum-Griffin Act's overriding aim to prohibit secondary boycotts, [the construction proviso] is strictly construed" *Drivers, Salesmen, Etc., Local Union No. 695 v. NLRB*, 361 F2d 547, 553, n. 23 (DC Cir 1966).

[21]See also *Associated Gen. Contractors of Cal., Inc. v. N.L.R.B.*, 514 F2d 433, 439 (9th Cir 1975) ("The construction industry proviso was designed to enable employers and unions to prevent friction between union and nonunion employees on the same jobsite."); *Essex County & Vic. Dist. Coun. of Carpenters, Etc. v. N.L.R.B.*, supra, 332 F2d 636, 640 (3rd Cir 1964) (quoted above, p. 15; *N.L.R.B. v. Intern. Union of Op. Engineers, Etc.*, 532 F2d 902, 907 (3rd Cir 1976) (the "rationale" of the proviso is " ... eliminating friction between union and nonunion workers on a jobsite ..."); *Operating Engineers Local 12 (ACCO Construction Equipment, Inc.)*, 204 NLRB 742, 752 (1973), enf'd 511 F2d 848 (9th Cir 1975) (" ... the 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite ..."); *Operating Engineers v. Neilsen & Co.*, 92 LRRM 2861, 2863 (D Id 1975) (the proviso "was designed to alleviate the frictions that may arise at a construction site when union men work alongside nonunion men"); *Long v. Floorcraft Carpet Co.*, 95 LRRM 3143, 3144 (D Or 1977) (" ... 'the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work *continuously* alongside nonunion men on the same construction site,' ..." quoting with approval from *ACCO*, supra, at 851 (emphasis in original); *Long v. Pam's Carpet Service*, 95 LRRM 3145, 3146 (D Or 1977); *Waggoner v. R. McGray, Inc.*, 432 F Supp 580, 583 (CD Cal 1977), rev'd on other grounds, 607 F2d 1229 (9th Cir 1979).

The statement of the majority below (654 F2d at 1315, n. 25; J.A. 84, n. 25) that subcontractor clauses have been "consistently" upheld is erroneous, as shown by the foregoing cases. Furthermore, *none* of the cases cited by the majority for upholding a subcontractor clause (654 F2d at 1315 n. 25; J.A. 84, n. 25) addressed the issue here of the acceptability of top-down organizing when there is no countervailing value of avoiding jobsite friction nor any other justifying interest.

4. The legislative history confirms that Congress had no intent to license subcontractor clauses such as this which act as broad top-down organizing weapons.

a. The Wagner Act's fundamental aim was to protect employees' free choice of their representative. The 1935 Wagner Act declared it "the policy of the United States" to protect "the exercise by workers of full freedom of ... designation of representatives of their own choosing."[22] It implemented this policy by providing for the employees' "right to bargain collectively through representatives of their own choosing" (Section 7, 49 Stat 452), for procedures to determine employees' choice by secret-ballot elections (Section 9), and making an unfair labor practice of employer conduct which restrains this employee right (Section 8(a)(1), 49 Stat 452).

Senator Wagner's statement regarding the Act emphasized: "Most important of all, it does not force or even counsel any employee to join any union" and it "does not favor any particular union" but "seeks merely to make the worker a free man" (78 Cong. Rec. 2371 (1935)).

In its first ruling on the Wagner Act, this Court stated that the Act was to "safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer" and observed: "That is a fundamental right ...."[23] This Court's subsequent decisions under the Wagner Act further emphasized that "Congress was intent upon the protection of the right of employees to ... the selection of representatives of their own choosing" and that this is "the fundamental policy of the Act"[24]—that this employee "freedom of choice ... is the essence of collective bargaining."[25]

b. The Taft-Hartley Act expanded on employees' right of free choice, including the right to refrain from union activity. The 1947 Taft-Hartley Act reaffirmed that "the policy of the United States" is

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[22]Section 1 of Wagner Act, July 5, 1935, 49 Stat 449. Similar provisions were contained in Section 7(a) of the National Industrial Recovery Act (48 Stat 195) and Section 2 of the Railway Labor Act of 1934 (48 Stat 1185).

[23]*NLRB v. Jones & Laughlin S. Corp.*, 301 US 1, 33 (1936).

[24]Justice Hughes in *NLRB v. Fansteel Metal. Corp.*, 306 US 240, 255, 257 (1939).

[25]Justice Douglas in *International Assn., Etc. v. NLRB*, 311 US 72, 79 (1940).

"protecting the exercise by workers of full freedom of ... designation of representatives of their own choosing." (29 USC § 151). It expanded on implementing this policy by confirming the employees' "right ... to bargain collectively through representatives of their own choosing" and adding the "right to refrain from any or all of such activities"(Section 7, above, p. 2), making more explicit provision for secret elections to determine employee choice (Section 9), and making an unfair labor practice of both employer and union conduct which restrains this employee right (Sections 8(a)(1) and 8(b)(1); 29 USC § 158(a)(1) and 29 USC § 158(b)(1)). In *Radio Officers*[26] the Court held that under Taft-Hartley the employees' right to refrain from joining a union is protected equally with their right to join, and that employees' jobs are insulated from their choice:

> " ... The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad or indifferent members, or abstain from joining any union without imperiling their livelihood...." (*Id* at 40, footnote omitted).[27]

c. **The McClellan committee found top-down organizing through boycotts must be limited by legislation.** The 1959 Landrum-Griffin amendments to the Act resulted in large part[28]

[26] *Radio Officers' Union v. NLRB*, 347 US 17 (1954).

[27] There are numerous court of appeals cases reflecting this point; e.g., *Local 57, International Ladies' Garment Wkrs' U. v. NLRB*, 374 F2d 295, 301 (DC Cir 1967, Burger Circuit Judge):

> "The right to choose a union ... is a cornerstone of the National Labor Relations Act; equally protected by the Act with the right of the workers to choose that representative is the right to have none. ..."

NLRB v. Gilmore Industries, Inc., 341 F2d 240, 241 (6th Cir 1965):

> " ...[I]t must not be forgotten that the paramount purpose of the Act was to secure to the employees freedom of choice in the selection of their representatives. [citations omitted] There can be no question but that freedom of choice may be seriously interfered with by economic inducements."

Retail Clerks Union, Local 770 v. NLRB, 370 F2d 205, 208 (9th Cir 1966); *Waterbury Community Antenna, Inc. v. NLRB*, 587 F2d 90, 91 (2d Cir 1978).

[28] It was the hearings of the Select Committee which "were in large part responsible for the inclusion of the secondary boycott provisions in the ... Labor-Management Reporting and Disclosure Act of 1959" (Final Report of the Select Committee on Improper Activities in the Labor or Management Field, United States Senate, pursuant to S. Res. 44 and 249, 86th Cong., 1960, at p. 68, and see p. 869 (hereafter "Final Report").

from the revelations of the Senate Select Committee created to investigate improper activities in labor-management relations and to determine if any changes in the law were required.[29] Headed by Senator McClellan, the committee over a two-year period held extensive hearings throughout the country. Among the practices investigated and condemned by the committee were numerous examples of "top-down" organizing of employees—where unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. The union would demand that the employer sign a contract. The contract would recognize the union and require the employees to join. If the employer refused to sign he would be picketed or boycotted—his work or his supplies would be cut off, often forcing him out of business.[30]

The Committee found "organizational picketing" had been "seriously abused" where "the wishes, desires, and interests of the employees involved as to whether they wished to be unionized were never considered" (Interim Report of the Select Committee on Improper Activities in the Labor or Management Field, United States Senate, Pursuant to S. Res. 74 and 221, 85th Cong., (1959) at 447 (hereafter "Interim Report")); that union leaders "encouraged and negotiated top-down contracts—agreements . . . which resulted in forced entry of employees into a union not of their choice" (*Id* at 445); and that employer representatives were also guilty of "improper activities" in that "[t]hey have forced employees to join unions, without ascertaining sentiment on the subject, by arranging for 'top-down' contracts . . . " (*Id* at 6).

The Committee found that such top-down organizing was often accomplished through a "hot cargo" provision in the union's contract with other employers, stating they would not do business

[29]Senate Res. 74, 85th Cong., 1st Session, creating the Senate Select Committee on Improper Activities in the Labor or Management Field, January 30, 1957.

[30]Examples included: Mr. Gilbert of San Antonio, Texas testified of the union representative's demand that he sign a contract "even though he admitted that the union did not represent a majority of the employees" (Final Report, p. 7). Mr. Barry of Houston, Texas testified that when he balked at signing a contract because the union did not represent his employees, the union representative said he "didn't care what [the employees] wanted, that [the union was] signing a contract with me, not them" (*Id* at 18). Mr. Coffey of Omaha, Nebraska testified that when he pointed out that the union did not represent his employees, the union representative told him "that didn't make any difference . . . they were going to organize me from the top down" (*Id* at 25). Mr. Clarke of Omaha, Nebraska gave similar testimony (*Id* at 33); and see *Id* at p. 69.

with anyone with whom the union had a dispute. If an unorganized employer refused to sign, the union called for applying the "hot cargo" provision against him. As Senator Ervin stated, "the so-called hot-cargo agreement . . . was being utilized by the [union] as a device to coerce these [other employers into] compelling their employees to join the union" (*Id* at 46). In its final report the Select Committee concluded:

> "The use of 'hot cargo' clauses . . . has been one important method by which [the union] has continued to use secondary pressure against certain employers for the purpose of carrying on its organizational efforts with respect to other employers.
>
> . . .
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> " . . . In every case heard by the committee the boycotts were used to coerce workers into joining unions which they did not want to join. . . . " (Final Report, p. 3)

The Committee's investigation included the construction industry. It found, for example, that the Sheet Metal Workers Union did not represent the employees but nevertheless sought "to force the employees to affiliate" with that union by directing "its campaign of intimidation against management" by compelling contractors to agree not to do business with an employer whose employees had elected to have a different union represent them (Final Report, pp. 60, 61). The proposal made to the committee to prevent the Sheet Metal Workers Union's conduct was to strengthen the Act "[b]y not permitting either the union or the employer to legitimatize a boycott by contract . . . " (*Id* at 62).[31]

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[31]The Committee made specific findings concerning the International Union of Operating Engineers, whose local is involved here. The Committee found that "[I]n the American labor movement the International Union of Operating Engineers stands out as an ugly example of ruthless domination of working men and women through violence, intimidation and other dictatorial practices" (Interim Report, p. 437)

The Committee elsewhere observed concerning the "construction field" generally that where "[d]ilution of the democratic processes in labor unions" is combined "with tight control of the labor supply in the particular skill involved, the potentiality for abuses associated with a monopolistic position is intensified" and contractors in unionized metropolitan areas "are disposed to avoid probable conflict with a union and refuse to accept bids from the small independents unless they have been unionized" and expressed concern for the "plight of the small independent who is faced with this dilemma [which] was graphically described during [the Committee's] hearings" (Final Report, p. 71).

Notably the general secretary-treasurer of the Sheet Metal Workers Union testified to the Committee that the "sole purpose" of the boycott agreement was to protect its members from lower wage rates.[32]

The Committee found that union top-down organizing was equally egregious when the employees had selected a different union to represent them.[33]

d. **A major aim of the Landrum-Griffin amendments was to limit top-down organizing.** As stated by this Court in *Connell*, supra:

> "One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. ... " 421 US at 632. See also *NLRB v. Iron Workers (Higdon Construction Co.)*, 434 US 335, 346-347 (1978).

The legislative record repeatedly confirms this. A few examples will suffice: Senator Mundt (who was vice-chairman of the Select Committee) stated to the Senate subcommittee considering the legislation:

> "The primary motivating condition which makes necessary ... congressional action, is the marked lack of voluntarism in the organizing techniques of American unions today. Substantial numbers of dues paying rank and file are not in the organized labor movement as a result of their own free will and

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[32]He testified:

" ... It has ... been said that our purpose is to raid the Steelworkers and to obtain recognition for ourselves in the Burt plant.

"Nothing could be further from the truth.

"I cannot emphasize too much or too often that our sole purpose in enforcing our agreements with our contractors is for the protection of job opportunities for our members and the elimination of the unfair competition from employers, of which Burt is one, *who receive such competitive advantage from the payment of lower wage rates*" (*Id* at 66, emphasis added).

[33]For example: The barbers of Terminal Barber Shops, Inc. at the New York Waldorf-Astoria Hotel had selected the Barbers Guild to represent them, but were nonetheless forced to join the Barbers Union of the AFL-CIO, to avoid picketing (Final Report, p. 52 and see p. 69). Similarly, the employees of Burt Manufacturing Co. had selected the United Steelworkers to represent them, but the Sheet Metal Workers Union engaged with contractors in boycotts against Burt because its employees were not members of the Sheet Metal Workers (*Id* at 60, 61, 70); though see note 32, supra.

volition. An even larger number, who desire organization, have been forced into unions to which they do not choose to belong. Free employee choice is being replaced by organization from the top down. . . . "[34]

Similarly, Senator McClellan told the subcomittee:

"I think one of the most vicious things, of course, is a form of compulsion that compels people to sign their employees into a union, whether they want to or not. . . . " (Senate Hearings (1959), supra, n. 34, p. 719).

Congressman Rhodes stated in house debate:

"One of the most cherished principles in our national labor policy is the principle of freedom of choice on the part of the workers of this country. . . .

"One of the most lasting impressions I obtained from my 6 years' experience on the Committee on Education and Labor was the extent to which the widespread use of the secondary boycott had made a mockery of this basic guarantee. In essence the secondary boycott is simply a device which enables powerful union officials to intervene in the affairs of employees they do not represent and to flout the majority rule principle. And the safeguards of the secret ballot in Labor Board elections. In other words, it is a method of forcing neutral employers to put pressure on other employers to capitulate to the union despite the wishes of their own workmen" (2 Leg Hist 1580).

Senator McClellan said in Senate debate:

"[Workers] ought not to be compelled and hijacked to join unions whether they want to or not, when they are not given a free choice. Compulsion and hijacking are nothing in the world but top-down organization; and top-down organization has no place in American law or American institutions,

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[34]Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 86th Cong., 1st Sess. on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311, Bills pertaining to Labor-Management Reform, p. 731 (1959) (hereafter "Senate Hearings (1959)"). Senator Mundt went on to state: "If there is any member of this committee that doubts the existence of this compulsory condition, I direct his attention to the 40-odd volume record of the McClellan committee investigations. Case after case has been revealed where individual choice on the part of the workers was totally ignored in union organization" (*Ibid*).

> because it is a type of economic force to compel and subject people against their will." (105 Cong. Rec. 6648-6649; 2 Leg Hist 1175).

Senator Goldwater said in Senate debate:

> " . . . I do not think any Member of the Senate will disagree with the thesis that we must take some action to stop coercive picketing when the whole purpose is to organize from the top down, without the consent of the employees." (105 Cong. Rec. 6664-6665; 2 Leg Hist 1191).
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> * * * * *
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> "Some of the most shocking of the revelations of the McClellan committee involved the use of secondary boycotts and recognition and organizational picketing . . . . In all such cases the interests and desires of the employees involved as to whether they wish to be unionized were never considered." (2 Leg Hist 1437).

Extensive review of the Act's legislative record shows that no member of the Senate or House ever expressed disagreement with this fundamental policy that employees are to have the right to freely select their representative and top-down organizing is not to be tolerated.

Nor did Congress abandon this fundamental principle of free employee choice when it turned to the construction industry.

> "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry. . . ." *NLRB v. Iron Workers (Higdon Construction Co.)*, supra, 434 US 335 at 347-348 (1978).[35]

Whatever accommodations were considered appropriate for the special characteristics of the construction industry, they were limited by this fundamental concern.

Congress' aim of limiting top-down organizing is reflected in several parts of the 1959 Act. Section 8(b)(7) was added to limit recognitional and organizational picketing of the employees' own employer. Section 8(e) was added to prohibit secondary boycott agreements, which (as shown above) Congress found were a frequently-used tool for top-down organizing one employer's employees by having other employers refuse to handle his goods or otherwise to do business with him. Section 8(b)(4)(A) was amended

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[35]See e.g. 2 Leg Hist 1180 (Sen. Mundt's description of "blackmail picketing" of electrical subcontractor to force him to recognize the IBEW).

to forbid coercion of employers and to make picketing to secure such a secondary agreement an unfair labor practice (see above pp. 2-3).

e. **The special characteristics of the construction industry do not justify, nor did Congress intend they justify, the broad top-down organizing of union signatory subcontractor clauses which apply when the union's members employed by the general contractor are not even present.** There can be no doubt that special characteristics exist in the construction industry. The essential question here concerns the nature of those characteristics and how Congress dealt with them in the 1959 Act. As shown from the Congressional Record, the construction industry has two special characteristics: (1) shortness of jobs, and (2) a work situs where employees of many employers work together. Each will be discussed:

(1) **The shortness of construction jobs does not justify top-down organizing by subcontractor clauses, nor did Congress intend that it should.** With respect to short job duration, as the majority below states (654 F2d at 1309; J.A. 72), "[t]he primary characteristics which differentiate the construction industry from most others are well stated" in a 1959 Senate Report as follows:

> "The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction" (S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. (1959); 1 Leg Hist 423).

The Report goes on to state that for two reasons these characteristics necessitate that labor contracts be made before a representative majority of employees is hired:

> " . . . One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. . . . " (*Id* at 424).

An identical statement was made by a House Committee Report.[38] In *Higdon*, supra, this Court referred to these same "aspects peculiar

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[38]H. Rep. No. 741, 86th Cong., 1st Sess, p. 19 (1959); 1 Leg Hist 777.

to the building trades" and observed that "Congress apparently thought [they] justified the use of pre-hire agreements with unions that did not then represent a majority of the employees" and that they were the reason for § 8(f) which the 1959 Congress added to legalize prehire agreements in the construction industry (434 US at 348).[37]

However, nowhere in the legislative history of the Act is it suggested that these needs required or justified the imposition of a labor contract on subcontractors through a group boycott or the organizing of their employees from the top down. And clearly these needs carry no such requirements. Although contractors (or subcontractors) may *voluntarily* enter prehire union contracts to know their labor costs and to have skilled workers, it does not follow that unions and general contractors may enter into agreements *requiring* subcontractors to do so. Subcontractors may already know their costs and have skilled workers without need for an agreement with this union or with any union.

Furthermore, this clause cannot be justified by the policies prompting § 8(f) because Congress intended that § 8(f) prehire agreements be *voluntary*. As this Court emphasized in *Higdon*, "Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle" (434 US at 348, n. 10).[38] Under the ruling below, however, a union can force an involuntary prehire labor contract on a subcontractor by picketing the general contractors to force them to agree to boycott the subcontractor from all AGC jobs if the subcontractor fails to sign. By no stretch can this

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[37]Section 8(f) further accommodated these construction industry needs by reducing from 30 to 7 days the period permitted for requiring an employee to join the union under a union shop clause, and permitting agreements for union referrals and for certain priorities in hiring (29 USC § 158(f)).

[38]As the Court further observed in *Higdon*, Senator Kennedy explained, with the explicit "'intention . . . to establish the legislative history on this question:

"'It was not the intention of the committee to require . . . the making of prehire agreements, but, rather, to permit them; nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements' 105 Cong. Rec. 18128 (1959); 2 Leg Hist 1715." (434 US at 348, n. 10)

be called "voluntary." It cannot be justified by any legislative policies found in § 8(f)'s prehire provisions, for Congress explicitly confined them to voluntary arrangements.

The construction industry's needs for forecasting labor costs and for a source of skilled workers—which arise from the characteristic of short job duration—are satisfied by § 8(f). They are irrelevant to § 8(e) and do nothing to justify the majority's interpretation of the proviso.[39]

(2) **The existence of a common work situs does not justify top-down organizing by union signatory subcontractor clauses which apply when the union's members employed by the general contractor are not even present, nor did Congress intend that it should.** In *NLRB v. Denver,* supra, 341 US 675 (1951), the general contractor engaged a nonunion subcontractor who paid below union scale. The union told the general contractor that "union men could not work on the job with nonunion men" (341 US at 679) and picketed when the general contractor refused to terminate the subcontract. The Court held that this violated § 8(b)(4). Justice Douglas dissented, stating:

> " . . . All the union asked was that union men not be compelled to work alongside nonunion men on the same job. . . . " (341 US at 692)

The Court's ruling in *Denver* prompted strong efforts by construction unions to have Congress pass legislation to overrule it.

Congress considered such legislation in its 1959 deliberations leading to the Landrum-Griffin amendments. The efforts to overrule *Denver* failed; no provision was passed to broadly except construction unions from the Act's secondary boycott provisions.[40]

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[39]Indeed, the Senate Report quoted by the majority below was on a legislative proposal that did not even contain a hot cargo or secondary boycott provision, much less any construction industry exception to it. The proposal's only provision concerning the construction industry was a forerunner to § 8(f). (1 Leg Hist 423).

The identical statement in the House Report was also made with explicit reference to the forerunner to § 8(f). It was on H.R. 8342 which did contain the additional construction industry proposal to overrule *Denver,* supra by permitting picketing of an entire jobsite based on a dispute with any contractor on the site. However, the asserted justification for that provision was separately stated and had nothing to do with forecasting labor costs or securing skilled workers (see H. Rep. No. 741, p. 21; 2 Leg Hist 778-781).

[40]The key concession obtained by the advocates of overruling *Denver* was "a commitment from the leadership of the House and Senate" that in January, 1960 a

However, as *Connell* observes, the construction proviso "seems . . . to have been adopted as a partial substitute for [that] attempt" (421 US at 629), so the legislative concerns expressed about *Denver* are instructive to show the concern of the proviso. During the 1959 debates, two such concerns were repeatedly stated: (1) that it could allow union wage standards to be undermined; (2) that it could force union workers to work "side by side" with nonunion workers. As shown below, neither concern can justify a broad union signatory subcontractor clause like this.

(a) **The first concern expressed in the 1959 Congress as a reason for overruling *Denver*—maintaining union wages and benefits—cannot justify this union signatory clause which excludes nonunion subcontractors even though they pay more than union wages and benefits.** In *Denver* the nonunion subcontractor paid wages substantially below union scale. During the 1959 debates opponents of *Denver* argued that that decision deprived construction unions of the power to limit such subcontracting, and that therefore union workers could be forced to work side by side with workers paid at subunion rates. For these reasons, it was urged that construction unions should be exempt from the prohibition against secondary boycotts (thus overruling *Denver*).

Senator Morse, a member of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, a member of the Conference Committee, and a consistent advocate for overruling *Denver*, described *Denver* as a case that " . . . involved an electrical subcontractor paying 42 cents an hour below the negotiated area rate" and argued it should be overruled (105 Cong. Rec. 17881, 2 Leg Hist 1425). That Senator Morse perceived the secondary boycott as essentially a means for unions to protect their wage standards, is illustrated by his comments during hearings of the Senate Labor Subcommittee:

> " . . . [W]orking conditions in one economic environment for some determines in no small measure the working conditions that are going to be available for the others.
>
> "I think that is the hottest of all the issues before us in this legislation, the secondary boycott issue.
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> * * * * *

situs picketing bill "will come to the floors of the House and Senate" (2 Leg Hist 1434, remarks of Sen. Kennedy). It was this future bill, which had been assured prompt consideration by both houses, not the construction industry proviso, that these advocates saw as the vehicle for achieving their aims.

> "[N]o self-respecting union man or woman is going to knowingly be a party, to help maintain low labor standards in the plant across the street or in the next town." (Senate Hearings (1959), supra, note 34, at p. 356).

Senator Morse' argument that a bill overruling *Denver* was necessary to allow unions to protect their wage standards was repeated by Senator Carroll:

> " ... The Denver case involved members of a craft union working on a big building. An electrical company, paying 42 cents an hour under the prevailing wage received a subcontract. The building trade workers—carpenters, bricklayers, and the rest—said, 'We refuse to work alongside them.' That was the basic issue involved ...
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> "... The company had men who were working for 42 cents an hour under the wage scale." (2 Leg Hist 1436)

The view that overruling *Denver* was necessary to protect union wage standards in the construction industry was also prevalent in the House. Representative Thompson, a member of the House Committee on Education and Labor and a House conferee, and Representative Udall, also a member of the Committee on Education and Labor, presented a memorandum favoring overruling *Denver* during the debates that preceded the House's adoption of the Landrum-Griffin bill. They said:

> " ... [Construction workers] *work side by side and the wages and working conditions of one trade affect all the others*. This situation is utterly unlike the situation in true secondary boycotts, as where carpenters in Los Angeles refused to work on nonunion doors made in Minnesota by the men whose wages could not affect the wages of carpenters in Los Angeles. The illegality of such a boycott would not be affected by the amendment." (2 Leg Hist 1577, 1588, emphasis added)

Thus, in Thompson's and Udall's view the purpose of overruling *Denver* was to allow unions to protect their wage standards from the threat posed by workers on the same job paid at lower rates.

That the concern for protecting union standards prompted the proviso to § 8(e) is shown from the debates on the Landrum-Griffin bill when it prohibited all secondary agreements without exception. During the House floor debates Representative Roosevelt, a member of the House Committee on Education and Labor, opposed the bill and stated that under it "an agreement, which is made for the

purpose of maintaining fair standards in an industry and which is in accord with the basic principles of honorable trade union philosophy, would become in itself an unfair labor practice" (105 Cong. Rec. 14220; 2 Leg Hist 1593). Senator Morse noted that under Landrum-Griffin prior to the addition of the proviso to § 8(e) "[a]n agreement requiring subcontracted work to be performed under certain wage conditions would be illegal" (105 Cong. Rec. 16399; 2 Leg Hist 1428). Senator Kennedy also viewed a general ban on hot cargo agreements as outlawing union standards agreements. In opposing such a ban he said:

> " . . . I believe it is in the public interest for employers and unions to agree not to do business with employers who pay substandard wages and maintain substandard working conditions. . . . " (2 Leg Hist 1195)

The proposed hot cargo ban, Kennedy said, would "make it impossible for decent employers and employees to protect their standards in vital industries. *This is an economic issue.* . . . It is a question of legitimate activity *to protect reasonable wages*" (2 Leg Hist 1195, emphasis added.)[41]

When Congress enacted § 8(e), union standards clauses—requiring subcontractors to meet union economic standards—were considered secondary; thus, union standards clauses could be legalized in the construction industry only by an exception to § 8(e). The concept that union standards clauses are primary (and therefore not within § 8(e)'s prohibition) had not yet developed. Indeed, until 1966 the Board held union standards clauses prohibited by § 8(e).[42]

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[41]Similarly Senator Humphrey condemned a broad prohibition on secondary boycotts since it would preclude boycotts of companies "paying substandard wages which are depressing and undermining the union standards throughout the industry. The sweatshop employer, no less than any other, in present law is protected" (2 Leg Hist 1037).

[42]E.g., *Meat and Highway Drivers, Etc., Local No. 710 (Wilson & Co.)*, 143 NLRB 1221, 53 LRRM 1475 (1963), enf'd in part, set aside in part and remanded in part, 335 F2d 709 (DC Cir 1964); *Truck Drivers Union Local No. 413 IBTCWHA (Patton Warehouse, Inc.)*, 140 NLRB 1474, 52 LRRM 1252 (1963), enf'd in part 334 F2d 539 (DC Cir 1964) cert. den. 379 US 916 (1964). In *Wilson* the subcontractor clause permitted "subcontracting to any company 'whose truckdrivers enjoy the same or better wages and benefits' as set forth in the contract" (143 NLRB at 1230, 53 LRRM at 1478). The union argued "that the clause does not sanction a secondary boycott against nonunion employers, but that it was designed to protect work for the employees in the bargaining unit by

It then reversed itself and labeled them "primary" and so not within § 8(e)'s proscription.[43] This rule has been accepted by several circuit courts[44] but has not yet been reviewed by this Court.

Clearly this union *signatory* clause cannot be justified by a need to maintain union standards. For union standards can be maintained by a union standards clause requiring subcontractors to pay wages and benefits equivalent to those paid under the union's contract. The added requirement imposed by a signatory clause — compulsory union representation — contributes nothing to the protection of union standards and serves only to organize the subcontractor's employees from the top down.

(b) **The second concern expressed in the 1959 Congress as a reason for overruling *Denver* — preventing jobsite friction between union and nonunion workers—cannot justify this broad subcontractor clause that applies even when there is no possibility of such friction.** The second concern was that of Justice Douglas in his *Denver* dissent—"union men should not be compelled to work alongside nonunion men on the same job" (341 US at 692). Douglas' dissent was quoted with approval by the House Committee on Education and Labor when it favorably reported on the Elliott Bill which would have overruled *Denver* (1 Leg Hist 687, 846). Legislators arguing to overrule *Denver* emphasized that the construction industry is unlike most others because employees of many different employers are employed together, working *side by side*. Representatives Thompson and Udall in a memorandum

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removing the economic incentive for subcontracting work to cartage companies who because of the lower wages and labor standards could perform the work cheaper" *(Ibid)*. The Board held "We see no merit in this argument" *(Ibid)*.

[43] *Highway Truck Drivers and Helpers, Local 107 (S & E McCormick, Inc.)*, 159 NLRB 84, 62 LRRM 1224 (1966), vacated and remanded sub nom *A. Duie Pyle, Inc. v. NLRB*, 383 F2d 772 (3rd Cir 1967), cert. den. 390 US 905 (1968). The Board's reversal followed decisions of the District of Columbia Circuit in *Orange Belt District Council v. NLRB*, 328 F2d 534 (DC Cir 1964), *Truck Drivers Union Local No. 413, Etc.(Patton Warehouse) v. NLRB*, supra, 334 F2d 539 (DC Cir 1964) cert. den. 379 US 916 (1964); and *Meat and Highway Drivers, Dockmen, Etc., Local v. NLRB (Wilson & Co.)*, supra, 335 F2d 709 (DC Cir 1964). In *McCormick*, the Board said:

> "We have since reconsidered our decision in the light of the court's reasoning and we now conclude in agreement with the court that the clause is primary, and thus not violative of Section 8(e)." (159 NLRB at 101-102, 62 LRRM at 1228.

[44] *NLRB v. Joint Council of Teamsters No. 38, 338 F2d 23, 28, 31 (9th Cir 1964)*.

urging passage of the Elliott Bill's provision to "overrule *NLRB v. Denver Bldg. Constr. Trades Council*" argued that construction is unique because the workers "work side by side" on "the same project" (105 Cong. Rec. 15541, 2 Leg Hist 1577). In a memorandum supporting the same provision Representative Elliott argued that "[W]here all the men ... on the same project ... work side by side" they have a special community of interest that distinguishes the construction industry (105 Cong. Rec. 15551-15552, 2 Leg Hist 1588). When the Senate failed to overrule *Denver,* Senator Carroll objected and said of *Denver:* "The building trade workers'—carpenters, bricklayers and the rest—said, 'We refuse to work alongside them [the nonunion workers].' That was the basic issue involved ... " (2 Leg Hist 1436). The construction proviso to § 8(e) was subsequently added in conference as a "partial substitute" (*Connell,* 421 US at 629) for overruling *Denver.* Thus, "There is little doubt that when Congress enacted the construction industry proviso to section 8(e), it was influenced by Justice Douglas' dissent in *Denver Building.*"[45]

As Congress recognized, it is not just the existence of subcontracting, but the side-by-side relationship that distinguishes the construction industry. For it is common in manufacturing industries for the fabrication of many components of the final product to be subcontracted. To the extent no such side-by-side relation exists, subcontracting in construction is no different than in other industries.[46]

The side-by-side relationship consistently appears in the history of the Act as the vital distinguishing trait of the construction industry. There is not even a suggestion that a construction union should have a special right divorced from that relationship, or that the mere fact that a general contractor's union employee has worked

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[45]Comment, The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott, 45 Cornell L. Q. 724, 753 (1960).

[46]Nor is there anything in the Congressional Record that suggests that the construction industry is unique merely because employees of different employers work on the same product. Small products are frequently moved from one employer's premises to another's and have employees of various employers perform work upon them; this is no justification for requiring all employees working on the product to be unionized. The critical distinction is that construction employees of different employers may be working on the product at the same time side by side, not that they may be working on the same product which is located at the same site.

at some time on a job should give the union a license to require employees of all subcontractors working at any time on the job to be union.

It is significant that on both occasions when this Court considered the construction proviso it described it as a measure allowing agreements relating to activities "on the construction site because of the close community of interests there" (*Connell*, supra, 421 US at 630; *Woodwork*, supra, 386 US at 638-639). When a union represents none of the contractor's employees who are present on a construction site, it is simply not a part of the "close community of interests" on that site. When a union, like Local 701 here, which is a stranger to that close community attempts to dictate the labor relations policies of the subcontractors on that site and to force itself upon the employees at that site as their bargaining representative, that union acts far in excess of what was contemplated by this Court in *Connell* and *Woodwork*.

Clearly the concern for jobsite friction cannot justify this broad clause, for it applies when no union members employed by the general contractor are even on the job so that no such union-nonunion friction is even possible.

In sum, Congressional concern in the construction industry was focused on jobsites where union members employed by general contractors worked "side-by-side" with subcontractors' employees, and where union standards and union jobs were at risk if subcontractors can undercut union rates. These concerns were accommodated by the construction proviso. A top-down organizing clause such as this which goes beyond these justifications, goes beyond the proviso.

B. The rulings below contain many errors.

1. **The Board erred in holding that the purpose of the proviso is irrelevant to clauses in a "collective bargaining relationship."** The Board held that Congressional policies underlying the proviso are relevant only to clauses outside a "collective bargaining relationship" (*Woelke & Romero*, supra, 239 NLRB at 248). This is clearly erroneous. Nothing in the "familiar rule"[47] of following legislative intent suggests that it is to be followed only some of the time. Nothing in *Connell*, which applied that "familiar rule" to the construction proviso, suggests that the proviso is to be applied

[47] *Connell*, 421 US at 628, quoting from *Church of the Holy Trinity v. United States*, 143 US 457, 459 (1892).

according to its purpose only sometimes and that other times it is to be applied literally, with no heed to its purpose. The Board's analysis and its ruling simply cannot be reconciled with *Connell*.

2. **The *en banc* majority erred in concluding the legislative history supports this top-down organizing clause simply because it is in a "collective bargaining relationship."** The majority does not expressly disregard Congressional policies, as did the Board, but instead looked at legislative history; yet its conclusion contains the same error. For the majority points to nothing in that history to support the conclusion that the legality of subcontractor clauses is to be determined by whether a "collective bargaining relationship" exists, and its brief review of that history omits Congress' "major aim" of limiting top-down organizing.

3. **The effect of this clause is identical to the illegal *Connell* clause whenever Local 701's members employed by the general contractor are not present.** The actual source of the majority's ruling is not found in the legislative history at all, but in the majority's erroneous interpretation of *Connell*. As previously noted, *Connell* held a virtually identical clause to be outside proviso protection. In *Connell* however, the general contractor employed none of the union's members so there was no "collective bargaining relationship." Stripped of its lengthy garb the simple holding of the majority is that *Connell* applies only to its narrow facts: such clauses are invalid under facts just like *Connell's* but otherwise are valid.

But neither common sense nor *Connell's* analysis supports such a rule. The effect of this clause on all jobs where none of Local 701's members employed by the general contractor are present is identical to the effect of the clause in *Connell:* there is the identical top-down organizing and no justification based on avoiding jobsite friction. *Connell's* analysis consisted of evaluating Congress' policies of limiting top-down organizing and avoiding problems on construction sites where there is a close community of interest. The clause in *Connell* was tested by those policies and found wanting. By the same test this clause is equally wanting except when Local 701's members are present.

According to the rule of the majority (and of the Board), if Connell had employed just one member of Local 100 for some time on one job and Local 100 had placed the same clause in a full-blown labor contract covering that one member, then the clause would have been lawful and could apply at all times to all jobs. Yet the effect of

the clause on all jobs when none of Local 100's members were working there would be indistinguishable from the effect of the clause condemned in *Connell:* an "almost unlimited organizational weapon" (421 US at 631) to organize subcontractors' employees from the top down although they have no contact with Local 100's members.

4. **The tenuous nature of a "collective bargaining relationship" in the construction industry cannot justify broad top-down organizing of subcontractors' employees by a group boycott.** The error below is emphasized by examining the nature of a "collective bargaining relationship" in the construction industry. A general contractor may only occasionally employ a member of the union, but as long as he has signed a labor contract he is said to have a "collective bargaining relationship" with the union. Furthermore, the Board has held that even though a contractor employs *none* of the union's members on *any* job, there is a "collective bargaining relationship" with a union that seeks a labor contract to cover future employees whom the union may not even represent.[48]

The rubric "collective bargaining relationship" thus labels the most tenuous of connections between an employer and a union. The extensive use of the phrase by the Board and majority below is seriously misleading if it is understood to mean anything more. As too often occurs, a high-blown phrase acquires an unwarranted stature of its own if we do not discern its real meaning. The phrase "collective bargaining relationship" in the construction industry means no more than that a union need only claim to represent one of the contractor's present or future employees on some job somewhere. Under the ruling below this licenses a broad signatory subcontractor clause that organizes subcontractors' employees at all times on all of the contractor's jobs regardless of their wishes.

5. **The majority's reasoning that this subcontractor clause is justified by "peculiarities" of the construction industry is unsound.** As shown above,[49] short job duration (which the majority says is the industry's "primary" differentiating characteristic (654 F2d at 1309; J.A. 72)) and the resulting needs to forecast labor costs and to have a source of skilled workers, were accommodated by

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[48] *Bldg. & Constr. Trades Council (Schriver, Inc.),* 239 NLRB 264 (1978), aff'd *sub nom Donald Shriver, Inc. v. NLRB,* 635 F2d 859 (DC Cir 1980), cert. den., ___ US ___ (1981).

[49] See above, pp. 27-30.

adding § 8(f) and clearly carry no requirement to top-down organize subcontractors' employees.[50]

The core of the majority's reasoning—and also the nub of its error—is its assertion that in the construction industry such signatory subcontractor clauses are needed to protect union standards. The majority finds the restraints of this clause justified by the union's need for "maintaining wage levels [and] protecting benefits" (654 F2d at 1316; J.A. 87). The majority reasons that because of the close proximity of jobsite employees the "working conditions applicable to one set of workers may very well affect others working on the same project" and, therefore (the majority holds), protecting these interests outweighs the evils of top-down organizing and secondary boycotts (654 F2d at 1317-1318; J.A. 89).

But the majority overlooks that these interests can be protected just as effectively by a "union standards" clause, which requires all subcontractors to adhere to union standards. Such clauses are lawful and, because they are primary, are not prohibited by § 8(e) and require no proviso protection. Because union standards clauses do not require the subcontractor to sign a union contract, the rights of free choice of the subcontractor's employees (which was a "major aim" of Congress) are fully preserved at the same time that the union's standards are protected. As stated by the dissenters below:

> " . . . This problem, however, is resolved by a common, primary, restraint: the union standards clause. Such clauses effectively insulate workers from falling industry standards by removing the incentive to subcontract. At the same time they avoid many of the evils inherent in the restraints here. . . . " (654 F2d 1328; J.A. 109).

6. The "bare references" in the legislative history to avoiding "serious damage" to the pattern of bargaining and preserving existing law do not warrant approval of a top-down organizational weapon which is inimical to the basic purpose of the Act.

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[50] In *NLRB v. Iron Workers (Higdon Construction Co.)*, 434 US 335 (1978), this Court analyzed "aspects peculiar to the building trades" perceived by the 1959 Congress (434 US at 348), a list nearly identical to this. In stark contrast to the majority below, however, *Higdon* concluded that Congress' perception of these characteristics did *not* evidence an intent to tolerate top-down organizing; on the contrary, *Higdon* stressed that "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry" (434 US at 347-348).

The majority relies heavily on what it calls "legislative discussion" of the proviso (654 F2d at 1312; J.A. 78). It consists of just three statements in the entire legislative history, two by Senator Kennedy and one by the Conference Committee.[51] Analysis of both the statements themselves and their context shows that the majority's reliance is seriously misplaced for many reasons:

a. ***Connell* considered and dismissed these very legislative statements.** The majority's reliance on these statements cannot be squared with *Connell*. The parties in *Connell* presented this Court with the identical legislative statements which form the basis for the ruling of the majority,[52] but this Court rejected these statements as a basis for applying the construction proviso. Instead this Court summarily dismissed the industry pattern remarks as "bare references" (421 US at 628). The *Connell* opinion also cites (421 US at 629, n. 8) the very legislative statements concerning preservation of existing law on which the majority places such emphasis, yet *Connell* made no inquiry into the state of the law in 1959, nor made any reference to any Congressional intent to preserve such law, nor even suggested that such a line of inquiry bears any relevance to the meaning of the proviso. Instead the Court tested the subcontractor clause before it against the Congressional policies of limiting top-down organizing, the close community of interests on the jobsite, and the proviso's objective of avoiding jobsite friction—and *not* by the test used by the majority (in this part of its opinion) of whether "some such agreements existed [in 1959]" (654 F2d at 1314; J.A. 82).

b. **These statements about preserving existing law do not describe the proper scope of the proviso, which is the issue here.** These statements do not even address the issue before this Court of the *scope* of the proviso. The statements say there is no intent to

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[51]The statements consist of Senator Kennedy's comment that the garment and construction provisos were to "avoid serious damage to the pattern of collective bargaining in these industries" (105 Cong. Rec. 17899, 2 Leg Hist 1432); a statement by the Committee that it does not intend to change the law concerning agreements "relating to work to be done at the site of the construction" and "To the extent that such agreements are legal today under Section 8(b)(4) . . . , the proviso would prevent such legality from being affected by section 8(e)" (H.R. Rep. No. 1147, 86 Cong., 1st Sess. 39; 1 Leg Hist 943); and a similar statement by Senator Kennedy who adds that at least some such agreements "appear to be legal today" (105 Cong. Rec. 17900; 2 Leg Hist 1433).

[52]Pet br in *Connell* 37-38, 41-42; Resp br in *Connell* 24-25 and note 5.

change the present law with respect to clauses which are *within* the scope of the proviso; but they *do not say what that scope is*. And *that* is the issue here. The statements only repeat the identical words of the proviso.[53] They purport to define the scope of the proviso by its own terms, by a tautological repetition of the statutory language, and thus they contribute nothing to the inquiry. As stated by the dissent below:

> " . . . [T]he most that can be said is that Congress intended to preserve the existing law within the scope of the proviso. That proposition, however, begs rather than answers the question of what the proper scope of the proviso is. That is what this case is about." (654 F2d 1327; J.A. 107).

c. **The intention of these statements did not encompass the licensing of broad top-down organizing when no countervailing policy is served.** These statements do not even purport to address the question here of whether the union's members must be present to justify a requirement that subcontractors' employees also be union members. The statements are broad and, like the statute, "must be interpreted in light of [their] setting" (*Connell*, 421 US at 628). A "major aim" was to limit top-down organizing. Although the construction industry was accommodated to avoid jobsite friction and prevent destruction of union standards, this clause goes beyond those accommodating and is contrary to that major aim. These brief statements cannot reasonably be said to intend such a broad license.

d. **The majority's interpretation of these statements would hold lawful the clause condemned by *Connell*.** By the majority's test (at this point in its opinion) of whether "some such agreements existed [in 1959]" (654 F2d at 1314; J.A. 82), the clause in *Connell* would have been lawful. As observed by the Board's General Counsel (and contrary to the majority's assumption, see 654 F2d at 1318 n. 32; J.A. 90, n. 32), *Connell*-type subcontractor clauses "containing little more than subcontracting provisions" and "not [in a] conventional collective bargaining relationship" were "commonplace" in 1959 (1974 Labor Relations Yearbook (BNA 1975) 298, 307). If, as the majority would have it, the proviso preserved

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[53]The proviso's language states that the scope of its exception is agreements "relating to . . . work to be done at the site of the construction" project. Both the Committee and Senator Kennedy's statements use words identical to the proviso itself, saying the law is unchanged with respect to agreements "relating to work to be done at the site of the construction" project.

preserved the legality of all clauses that existed in 1959, it would clearly have preserved the legality of the commonplace "stranger" signatory clause condemned in *Connell*.

Despite its reliance on the preservation of existing law remarks, the majority does not even consider the legality in 1959 of *Connell*-type clauses. In fact, the case law as of 1959 relied on by the majority contains no suggestion that the legality of any hot cargo clause would in any way be affected by the presence or absence of a "collective bargaining relationship."[84] Since the majority's reasoning would legalize the clause in *Connell*, it is clearly inconsistent with that case.

e. **The legality of such subcontractor clauses had not yet been evaluated or clearly determined in 1959.** The majority's use of these legislative statements is further in error because it assumes that such subcontractor clauses were lawful in 1959—so (the majority reasons) the law with respect to them remained unchanged after the amendments. However, as emphasized by the dissent below, "the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined in 1959" (654 F2d at 1327; J.A. 107).

The majority asserts that it "seems more likely than not" that such agreements were lawful (654 F2d at 1313; J.A. 80), but the only cases it cites are *Operating Engineers Local Union No. 3 v. NLRB (Northern California)*, supra, 266 F2d 265 (DC Cir 1959), cert. den. *sub nom St. Maurice v. NLRB*, 361 US 834 (1959), and *Sand Door*, supra, 357 US 93 (1958).

The majority's discussion of *Northern California* neglects to mention that the case was not decided under § 8(b)(4), the secondary boycott statute; instead it was decided under §§ 8(b)(1) and (2) and 8(a)(l), (2) and (3). The Conference Committee statement on which the Court relies purports to preserve certain secondary agreements "to the extent that such agreements are legal today *under § 8(b)(4)*" (1 Leg Hist 943, emphasis added). Since *Northern California* was not decided under that statute, the very legislative source which forms the basis of the majority's argument shows the irrelevance of that case. It also bears noting that *Northern California* hardly

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[84] *Sand Door*, supra, 357 US 93; *Truck Drivers and Helpers Local Union No. 728 (Genuine Parts Co.)*, 119 NLRB 399 (1957); *Northern California Chapter*, 119 NLRB 1026 (1957), aff'd 266 F2d 265 (DC Cir 1959), cert. den. in part and rev'd in part 361 US 834 (1959).

presented the type of legal landmark that Congress might wish to preserve; there was a split among the three Board members who voted in favor of the clause and a strong dissent from the remaining two members. Furthermore, the union's concern in that case was the undercutting of union standards, and both union and nonunion employees were working side by side on the job;[55] it did not even address the issue here of a union signatory effort unconfined to union standards and applying when no union member is employed by the comtractor present.

Equally misplaced is the majority's reliance on *Sand Door.*[56] In that case this Court said, "There is no occasion to consider the invalidity of hot cargo provisions as such" (357 US at 107) and while the Court noted that "voluntary observance of a hot cargo provision by an employer" was permissible (357 US at 108), the opinion strongly implies that there was no legal remedy against an employer who breached a hot cargo clause. The Court said:

> " . . . [T]he freedom of choice for the employer contemplated by § 8(b)(4)(A) is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy. . . . " (357 US at 105).

This "freedom of choice," the Court stressed, "must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into between the parties" (357 US at 105). The Court's solicitude for the employer's freedom of choice raises serious doubt whether an employer's refusal to abide by a hot cargo clause could subject him to any claim for damages or other relief. If an employer who was faced with a subcontracting decision knew that a subcontract to a nonsignatory firm would subject him to liability for the pay that all of the union workers would have received had he chosen the signatory contractor, the economic

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[55] "[T]he Union protested . . . referring specifically to . . . pay scales, working conditions, and [fringe benefit] payments" 119 NLRB at 1036. The triggering element of the work stoppage was that a subcontractor's employees who were not members of the union "had no objection to working alongside" the union's members (119 NLRB at 1030), but the union's members on the project objected and stopped work. Even under these facts two Board members "Regard[ed] the subcontractor's clause as intrinsically illegal" (119 NLRB at 1035).

[56] *Local 1976, U. B. C. & J. v. NLRB (Sand Door)*, 357 US 93 (1958). *Sand Door* held that hot cargo agreements were no defense to a union's inducement of secondary employees to engage in a strike in violation of § 8(b)(4).

pressure to choose the signatory contractor would be overwhelming. Such an employer would not have the "freedom of choice . . . notwithstanding any private agreement entered into between the parties" which *Sand Door* requires. Furthermore, if that coercive agreement is forced on the employer by a strike (as the majority below permits), the "freedom of choice" evaporates completely.

Thus, while *Sand Door* did not hold hot cargo clauses to be illegal, it cast serious doubt on their enforceability. The line between an illegal agreement and an unenforceable one is a thin one—a distinction not likely to be observed with precision in the give and take of legislative debate.

The impact of *Sand Door* on the enforceability of hot cargo clauses did not escape the attention of Congress. Senator Goldwater[57] submitted a statement to the joint subcommittee on labor-management reform legislation of the House Committee on Education and Labor stating that there is "danger that by acting in this field we may overrule existing decisions which outlaw hot cargo type of agreements."[58] When asked during his testimony before the joint committee what he meant by "existing decisions," the Senator replied: "We have a decision of the Supreme Court on that. It is a Supreme Court decision that says a hot cargo clause outside the transportation industry cannot be enforced. This [proposed legislation] might upset that" (*Ibid*). Thus, Senator Goldwater's view of "existing law" was that hot cargo contracts were unenforceable and he used the notion of unenforceability interchangeably with illegality. Similarly, the view was expressed in the House that under existing law "hot-cargo contracts are unenforcible [sic]" (2 Leg Hist 1620, remarks of Rep. Cramer).

In sum, at the time the LMRDA was enacted the legality of hot cargo clauses under § 8(b)(4) was an open question, under other sections of the Act a clause had been upheld in a context concerned with union standards and where the union and nonunion employees worked side by side, but only by a narrow majority of the Board and

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[57]Senator Goldwater was a member of the McClellan Committee, a member of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, and a conferee.

[58]4 Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess. on H.R. 4474 and Related Bills Regarding Labor-Management Reform Legislation (1959), p. 1647 (hereafter "House Hearings").

in the face of a strong dissent, and there was strong doubt that there was any remedy for breach of such a clause. Thus, the 1959 law of hot cargo clauses would provide the murkiest of guideposts to the meaning of the proviso; in addition, such a test for proviso legality would be wholly insensitive to the purposes of the proviso and to the circumstances surrounding its enactment. This again confirms the wisdom of *Connell's* dismissal of the "preservation of existing law" remarks as a basis for determining the scope of the proviso.

f. **There is no reasonable basis for claiming that Congress assumed that clauses functioning like this one were lawful or intended them to continue to be so.** The lack of any clear determination of the legality of such clauses in 1959 cannot be overcome—as the majority below seems to suggest—by arguing that Congress assumed clauses like this lawful and intended that they continue to be so.

In an apparent attempt to show that Congress perceived signatory subcontractor clauses to be legal under "existing law" the majority below states that a House subcommittee was made aware of *Northern California*, supra, (654 F2d at 1313, n. 22; J.A. 80). Although it is true that a copy of that decision was filed with the subcommittee (2 House Hearings, supra, n. 58, at 804) the case was there described as a "decision that makes it clear that the union and the employer had *violated the unfair labor practice section* of the Taft-Hartley Act" (*Ibid*, emphasis added). The decision had been previously brought to the attention of a three-person panel of the subcommittee where its labor consultant indicated that the court had upheld a subcontracting agreement, but also stated that the Board had "split three ways on the question" of whether "the subcontractor clause was legal," that "[t]wo members felt that the contract was not legal; two members felt that it was legal [and] [t]he third member was some place in between" (5 House Hearings, supra, n. 58, at 2368). Representative Roosevelt responded:

> "Obviously, Mr. Chairman, there seems to be confusion as to whether this is a legal thing, or not. My own opinion would be that this is obviously an unfair labor practice and should be so ruled." (*Ibid*).

Representative Hiestand then observed:

> " . . . I am prone to agree with my colleague that this is an unfair labor practice, but that if there is any question and the courts have any doubt about it, it is obviously the responsibil-

> ity of the committee to write and correct the law so that there can be no such incident recur. This is a manifest injustice." (*Id* at 2369).

To which Representative Roosevelt replied:

> "I just want to say I concur with Mr. Hiestand." (*Ibid*).

No one said otherwise.

This record, cited only in part by the majority, is directly contrary to the notion that Congress thought such clauses lawful and to the notion that it intended to continue them so. By no stretch can these isolated events in a voluminous record support a claim (as suggested by the majority) of Congressional awareness, much less a stamp of approval, of broad subcontractor clauses used as top-down organizational weapons.

g. **Congress did not intend to license any and all forms of broad subcontractor clauses simply because "some" such clause existed in 1959.** The majority relies on a survey by Leon E. Lunden to show that a pattern of bargaining existed in 1959, which (according to the majority) Congress intended to preserve (654 F2d at 1313, J.A. 81-82). But the Lunden study is of no value here since it fails to distinguish union standards clauses, union signatory clauses, and clauses placing other restrictions on subcontracting. The Board's General Counsel found the Lunden study "inconclusive"[59] and so made his own study, which found union signatory clauses of any form in only eight (fewer than twelve percent) of the contracts examined, and which concluded that there was no consistent pattern in 1959.[60]

The majority reasons that it is sufficient if "some such agreements existed" in 1959 for all construction unions to be free to

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[59]General Counsel's Memorandum, December 15, 1976, 93 Lab Rel Reporter 390, 404, reprinted in 1976 Lab Rel Yearbook 295, 309.

[60]The General Counsel stated:

> " ... The only 'pattern' that does emerge is that of a mosaic, i.e., many different practices that vary with the union, and the geographic area involved. To say that Congress intended to preserve this 'mosaic pattern' would lead to the conclusion that the legality of a 'particular union' subcontracting clause today depends on whether the signatory union in the particular geographic area had such a clause in 1959. Absent express statutory language or clearly compelling legislative history, one would not infer that Congress intended to have different 8(e) results for different geographic areas and different construction unions, depending upon practices that existed 17 years ago." (93 Lab Rel Reporter at 394-395, 1976 Lab Rel Yearbook at 309).

top-down organize (654 F2d at 1314; J.A. 82). Thus, by the logic of the court below, the mere existence of a handful of such clauses in 1959 constitutes a "pattern" which licenses construction unions nationwide to engage in broad top-down organizing in defiance of the major aim of the 1959 Act.

The limited and sketchy evidence of 1959 subcontracting restrictions demonstrates the wisdom of the *Connell* Court in eschewing this as a basis for construing the construction proviso. The interpretation of this important statute should rest not on patchy evidence relating to legislative statements growing out of an eleventh hour compromise to rescue a faltering labor reform bill, but should instead rest on the basic values and goals embodied in that legislation.[61]

h. **Mechanical application of the pat verbal formulae of preserving 1959 conditions is inconsistent with the rule of *Connell* and *Woodwork* that the proviso is to be applied in light of the statutory setting and the circumstances surrounding its enactment.** This Court has cautioned against rigid adherence to the letter of a statute and observed that this principle "has particular application in the construction of labor legislation which is 'to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views . . . ' " *Woodwork*, supra, 386 US at 619. This language is particularly apt here. The secondary boycott provisions were the most controversial and were the last and most difficult to be resolved in conference (2 Leg Hist 1375).[62] Since the fate of the entire Act was hanging in the balance, the pressure on the conferees to resolve this final impasse was substantial; it is not surprising, then, that the resolution of the

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[61]The majority's view finds scarce support even in Senator Kennedy's comment — which is the majority's sole cited support on the point — about avoiding "serious damage" to existing bargaining. Merely because "some" unions may have had top-down organizing clauses in 1959, it does no "serious damage" to the construction industry's pattern of bargaining to limit their top-down organizing impact to those circumstances which Congress considered needing accommodation. There is no indication that just because "some" top-down organizing clauses existed in 1959, Congress intended to license any and all similar clauses.

[62]Senator Dirksen, a conferee, reported to the Senate while the Conference Committee was still in progress, that agreement had been reached on the first six titles to the bills. Only title 7 remained and in that title "Our major difficulty, however, Mr. President, is in the field of secondary boycotts" (2 Leg Hist 1375).

deadlock was described by the Conference Committee in terms of such breadth and generality, including defining its scope by its own terms, that each faction could find support for its position. Thus, for example, two conferees (Senator McNamara and Representative Thompson) thought that the construction proviso allowed a union and a contractor to agree that the contractor would not install materials fabricated in a nonunion shop (2 Leg Hist 1815, 1816); other conferees disagreed, as have the Board and the courts. Senator Kennedy may have thought that the proviso might permit some form of union signatory subcontractor clauses, although the record does not show any consideration of the precise point. But, given the strongly held opposing views on boycotts, resulting in an impasse among the conferees, given the conferees' use of broad and ambiguous language as one means of achieving compromise, and given that, as a last-minute addition to the Act, the proviso was not a subject of any committee hearings or reports to more specifically elucidate its meaning and there was little time for legislators to acquaint themselves with it, the necessity for "reconstitut[ing] the gamut of values current at the time" (*Woodwork*, supra, 386 US at 620) in order to effectuate the intent of the legislature as a whole is especially acute for this statute. It would be wholly inconsistent with *Woodwork* and with *Connell's* admonition that the proviso must be viewed "in light of the statutory setting and the circumstances surrounding its enactment" (421 US at 628), to resolve the present controversy based on a mechanical inquiry into 1959 practices or 1959 law.

7. **The majority's reliance on § 8(b)(7) is in error.** The majority below seeks to distinguish *Connell* on the ground it is a narrow ruling which merely fills a "gap" in § 8(b)(7). The majority reasons that, since the union in *Connell* disclaimed any interest in organizing or representing Connell's employees, its picketing was not limited by § 8(b)(7), so would have been unlimited if the subcontractor clause had not been found outside the construction proviso. The majority reasons that "[t]he situation is quite different when a union seeks a subcontractor clause in the context of a collective bargaining relationship. In that situation the union's coercive force is limited" (654 F2d at 1321; J.A. 95).

This is wrong. A union which seeks a subcontractor clause in the context of a "collective bargaining relationship" can exert the same unlimited coercive force which *Connell* found unlawful. If the union

represents the employer's employees, it can, under the majority's rule below, refuse to sign a contract unless it has a signatory subcontractor clause and can picket indefinitely to secure such a clause without violating § 8(b)(7) or any other provision. The majority asserts that "the employer may resist any such attempts . . . by asserting its own bargaining position and presenting its own demands" (654 F2d at 1321; J.A. 95); the same unrealistic argument could be made concerning a union demand for a hot cargo clause in any industry, but Congress found it unacceptable and adopted § 8(e). Furthermore, even if the union does not represent the employer's employees, it can engage in "informational" picketing to publicize the fact that the employer has no contract with the union without violating § 8(b)(7) or any other provision, and can do so indefinitely, under the majority's rule, until the employer signs a contract containing this subcontractor clause.[63]

8. **The majority's argument of "immense practical problems" is baseless.** The majority asserts that only a rule permitting broad signatory subcontracting clauses is practical, and that "[l]imitation of subcontracting agreements to sites where there may be shoulder-to-shoulder conflict between union and nonunion workers presents immense practical problems" (654 F2d at 1321; J.A. 97). This is baseless.[64]

The majority suggests that subcontracting agreements limited to sites where union employees are present (and where union-nonunion friction can therefore occur) may require separate negotiation for each jobsite (654 F2d at 1322; J.A. 97). But there is nothing in the jobsite-friction rule that would necessitate such repeated negotiations. As the majority itself recognizes (654 F2d at 1322; J.A. 97) a single agreement can be negotiated containing a clause which applies to every job where the general contractor's Local 701 employees are present and where union-nonunion friction is therefore possible.

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[63]Such "informational" picketing is lawful even if its ultimate objective is to force the employer to recognize and bargain with the union. *Smitley v. NLRB*, 327 F2d 351, 352, 353 (9th Cir 1964) (Picketing held not to violate § 8(b)(7) even though "an object of the picketing was to secure recognition"); *Barker Brothers Corporation v. NLRB*, 328 F2d 431 (9th Cir 1964), and cases cited therein.

[64]No such argument was made by any party to this case below. The Board conceded on oral argument to the panel (in response to the court's question) that no such practical problems exist.

The contention that "enforcement problems" of such a clause "remain severe" (654 F2d at 1322; J.A. 97) ignores decades of experience under the NLRB's rule for common-situs secondary boycotts. That rule permits a union to picket a construction jobsite only when employees of the primary employer are on the jobsite.[65] The test of legality based on the jobsite presence of particular employees is thus commonplace in the construction industry and is no more difficult to apply in determining the legality of enforcing a subcontractor clause than in determining the legality of a picket line.

9. **The ruling that subcontractors' employees can be forced to join a particular union is erroneous.** This signatory subcontractor clause requires subcontractors' employees to be members not just of *some* union, but of this *particular* union. The majority's short discussion of this point repeats its same basic errors which have been shown above. The requirement of membership in a specified union serves none of Congress' aims, serves only to organize employees from the top down, and thus finds no shelter from the proviso.[66]

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[65]E.g. *Carpenters' Council of Milwaukee*, 196 NLRB 487, 490, (1972); *Local 519, Journeymen v. NLRB*, 416 F2d 1120, 1124-1126 (DC Cir 1969); *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 27 LRRM 1108 (1950).

[66]The three-judge panel held that the proviso protects a clause that applies "when the employer or his subcontractor has employees who are members of the signatory union at work *at some time* at the jobsite at which the employer wishes to engage a nonunion contractor" (609 F2d at 1347; J.A. 56; emphasis added). Under this rule a general contractor who engages a union subcontractor whose work terminates at the earliest stage of a project (for example, an excavation subcontractor) can be barred from subcontracting to a nonsignatory the landscaping work, which is to be performed months and perhaps years after the excavation work is completed and the union engineers have left the site. Application of the proviso to a clause with such a broad reach does not serve the proviso's purpose. Such a clause might also make a union signatory subcontracting obligation retroactively operative to a project where all subcontractors are nonsignatory and where the general contractor uses no union employees but where, through inadvertance, a subcontractor's subcontractor appears with a union member during the final phases of the project.

Just as there is no risk of jobsite friction between union and nonunion employees working on different jobs separated by miles of space, so there is no such risk when they work in the same job but are separated by time.

CONCLUSION

For the above reasons the Court should rule that the clause herein violates § 8(e), is not protected by the construction industry proviso, and (in the words of § 8(e)) is "unenforceable and void." The judgment of the court of appeals should be reversed and that court should enter an appropriate order requiring Local 701 and AGC to cease and desist from enforcing or giving any effect to this clause.

Respectfully submitted,

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